IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3623 OF 2001

Mahavir Cooperative Bank Ltd.
Kolhapur and Ors. .. Petitioners

Versus

Divisional Joint Registrar
C.S. Pune and Ors. .. Respondents

Mr.V.K.Choudhary for petitioners

CORAM : S.C.DHARMADHIKARI, J.

DATE : DECEMBER 16, 2004.

P.C.

. A cooperative bank is before me aggrieved by an order of the Divisional Joint Registrar,

Pune Division, Pune directing the Special Recovery Officer to proceed against the properties of the borrowers first and thereafter against the properties of the sureties, in execution of a Recovery Certificate issued under section 101 of the Maharashtra Cooperative Societies Act, 1960. (for short MCS Act).

2. Respondents, other than learned A.G.P. appearing for authorities, are absent despite notice.

3. In the case of State Bank of India Vs. M/s.Indexport Registered and Ors. reported in 1992 (3) S.C.C. 159 the Supreme Court has considered this issue and held that the liability of a surety is co-extensive with that of principal borrower. After noticing the relevant provisions of the Contract Act, the Supreme Court has observed thus:-

"The decree does not put any fetter on the right of the decree holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree holder. The decree does not postpone the execution. The decdree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right of the decree holder to proceed with it in a way he likes. There is nothing in law which provides such a composite decree to be first executed only against the property. The decree for money is a simple decree against the judgement -debtors including the guarantor and in no way subject to the execution of the mortgage decree

> against judgement debtor 2. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree holder to proceed against the mortgaged property first and then to proceed against the guarantor."

4. Mr.Choudhary, learned Counsel appearing for petitioners invites my attention to Rule 107 of the Maharashtra Cooperative Societies Rules 1961. (for short MCS Rules). The said rule falling under Chapter XII (Miscellaneous) sets out procedure for attachment and sale of property under section 156. A reading of the said Rule does not indicate in any manner that the execution cannot proceed against a surety. However, it is not necessary for me to decide this wider issue in the light of the clear

pronouncement by the Supreme Court.

5. In the result, the order of the Divisional Joint Registrar directing petitioner before me to proceed against principal borrower first and thereafter only to proceed against the surety is unsustainable in law. The said order and direction of the Divisional Joint Reguistrar, C.S. Pune is quashed and set aside. The Special Recovery Officer to proceed with the execution in accordance with law and considering the fact that the proceedings have been delayed for all these years, he should endeavour to dispose them of expeditiously. All concerned to act on an authenticated copy of this order.

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